IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

COMPANY PETITION NO.420 OF 2006
WITH
COMPANY APPLICATION NO.700 OF 2006

China Shipping Development Co. Ltd. ...Petitioner.
Vs.
Lanyard Foods Limited. ...Respondent.

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Mr. Snehal Shah with Mr.K. G. Munshi i/b. G.R. Mehta for the Petitioner.
Mr.Rampal S. Tripathi for the Respondent.

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CORAM :DR.D.Y.CHANDRACHUD, J.
April 4, 2007.

ORAL JUDGMENT:

In pursuance of a contract of affreightment dated 23rd December 1999 for a consignment of RDB Palmolein Cargo, the Respondent executed four letters of indemnity of 13th April 2000. Those letters were purported to have been issued by the Company jointly and severally with the State Bank of Saurashtra. For the purposes of the present proceedings, reliance has been placed by both the Counsel on the Indemnity bearing No.1308. The provisions of the indemnity contained the following request to the Petitioner:

> "We hereby request you to order the vessel to proceed to Mangalore and give delivery of the said cargo at the port of Mangalore to delivery to the order of Lanyard Foods

> Ltd. No.1119-A, Kiadb Industrial Area, Balkanpadi, Mangalore 975011, India without production of the original Bills of Lading."

The request contained in the other three letters of indemnity (bearing Nos.1065, 1066 and 1309) was similar, save and except that the Ports of delivery were referred to therein as Chennai and Karwar. Each of the documents of indemnity executed by the Respondent indemnified the Petitioner in the following terms :

> "1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expenses of whatsoever nature which you may sustain by reason of the vessel proceeding and giving delivery of the cargo in accordance with our request.
>
> 2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the vessel proceeding and giving delivery of the cargo as aforesaid to provide you or them on demand with sufficient funds to defend the same.
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> 3. If, in connection with the vessel proceeding and giving delivery of the cargo as aforesaid, the ship or any other ship or property belonging to you should be arrested or detained or if the arrest or detention thereof should be threatened to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property and to indemnify you in respect of any liability, loss, damage or expenses caused by such arrest or detention or threatened arrest or detention whether or not such arrest or detention or threatened arrest or detention may be justified.

4. As soon as Bills of Lading for the above cargo shall have come into our possession to deliver the same to you.

5. The liability of each and every person under this Indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person whether or not such person is party to or liable under this Indemnity.

6. The liability of each and every person under this Indemnity shall in no circumstances exceed 200% of the CIF value of the above cargo.

7. This Indemnity shall be governed by and construed in accordance with English Law and each and every person liable under this Indemnity shall at your request submit to the jurisdiction of the High Court of England."

The Petitioner delivered the cargo in compliance with the request made by the Respondent and in terms of the Letters of Indemnity. Delivery of the cargo covered by the Bill of lading relating to indemnities 1065 and 1066 was effected at Chennai on 2nd and 3rd June 2000; delivery of the cargo represented by the Bill of Lading described in Indemnity 1308 was effected at Mangalore on 23rd and 24th April 2000 and of the cargo represented in Indemnity 1309 at Karwar on 25th and 26th April 2000. By reason of the Petitioner having delivered the cargo in accordance with the request of the Respondent in terms of the letters of Indemnity, the Petitioner

incurred liabilities towards third parties who asserted that they were lawful holders of one or more of the original Bills of Lading. Legal proceedings were initiated against the Petitioner in which the Petitioner had to pay an aggregate sum of US $ 44,65,890/- apart from incurring costs and expenses. By letters dated 28th July 2000 and 3rd August 2000, the Petitioner furnished notice to the Company of the aforesaid legal proceedings and called upon the Company to place the Petitioner in funds to enable the Petitioner to defend the legal proceedings. The Company denied its liability by a letter dated 1st August 2000.

2. The Petitioner instituted proceedings before the High Court of Justice of England and Wales against the Bank of Saurashtra. On 15th January 2001, Mr.Justice Thomas in the Queen's Bench Division upheld the defence of the Bank of Saurashtra that the signature of its officer (on the indemnity which was furnished by the Respondent) was a forgery and that consequently, an action against the Bank could not be maintained. Thereupon, on the foundation of the obligation of the Respondent under the Letters of Indemnity, the Petitioner instituted proceedings against the Respondent in June 2003 in the High Court of Justice,

Queen's Bench Division (Commercial Court). The Respondent was duly served with the proceedings, but failed to respond or to file a defence in the Court in England. In September 2003, the Petitioner moved the English Court for permission to apply for a Summary Judgment under Clauses 24.1 and 24.2 of the English Civil Procedure Rules. Intimation of the proceeding, which was fixed for hearing on 13th January 2004, was served upon the Company by the Petitioner's lawyers in England by a letter dated 8th October 2003. The Company failed to appear in the proceedings in England. By a judgment and order dated 13th January 2004, the English Court granted to the Petitioner a Summary Judgment in the sums of US $ 44,65,890.26, US $ 2,69,324.77, UK Pounds 1,10,502.32, HK $ 1,85,000/-, SG $ 44,694.64 and RMB 2,41,524/- respectively together with interest and costs of UK Pounds 30,000/-. These amounts were awarded together with interest at the rate of 9% per annum. The Company was served in February 2004 and a certificate dated 24th March 2004 of the Master of the English Court has been relied upon certifying that no appeal has been brought against the judgment and that the judgment is enforceable.

3. By a notice dated 11th October 2005, issued under Sections 433 and 434 of the Companies' Act, 1956, the Petitioner called upon the Respondent to pay the amount that was due and outstanding under the judgment of the Court in England. There was no reply to the notice. A petition for winding up has been instituted on the foundation that there is a debt due and payable by the Company to the Petitioner, in the total amount of Rs.26,99,67,511/-.

4. An affidavit in reply has been filed in these proceedings. The defences to the petition for winding up that were urged at the hearing are that: (i) The statutory notice of winding up is based on the decree of the English Court and not on the indemnity simpliciter; (ii) A petition for winding up is not a mode of execution of a decree; (iii) The judgment of the English Court does not fulfill the requirement of Section 13 of the Code of Civil Procedure, 1908, inasmuch as the judgment has been passed by a Court without jurisdiction and it is not a judgment on the merits of the dispute. These defences would now have to be evaluated.

5. The remedy invoked by the Petitioner in the form of a

petition for winding up cannot be regarded as an exercise for the execution of the decree of the English Court. Section 433(e) of the Companies' Act, 1956 contemplates as a ground for winding up, a situation where the Company is unable to pay its debts. Section 434 provides a deeming fiction when a Company is unable to pay its debts. Clause (a) of sub-section (1) envisages a situation where a creditor to whom the company is indebted in a sum of Rs.500/- has served a notice of demand on the registered office of the Company which the Company has failed for a period of three weeks or neglected to pay. Under clause (c) of sub-section (1) of section 434, the Company is deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the Company is unable to pay its debts and in determining this Court has to take into account all contingent and prospective liabilities of the Company. Section 439(1)(b) contemplates an application to the Court for the winding up of a Company by a petition presented by any creditor or creditors including any contingent or prospective creditor or creditors. The Petitioner is justifying in asserting its locus as a creditor of the Company on the strength of the decree of the English Court. Once the locus of the Petitioner as a creditor of the Company on that foundation is established, the Court would

then have to assess whether an inability to pay its debts on the part of the Company has been established with reference to the provisions of Section 433(e) read with clauses (a), (b) or (c) of sub-section (1) of Section 434. That such a Petition for winding up would be maintainable on the basis of a judgment of a foreign court also emerges from a judgment of Hon'ble Mr.Justice N. D.Vyas in **Silver Shield Construction vs. Recondo Ltd**.[1]

6. The Petitioner called upon the Respondent to fulfill its obligation in terms of the indemnity by communications dated 28th July 2000 and 3rd August 2000. In the reply dated 1st August 2000, there was no denial by the Respondent of the execution of the Letters of Indemnity. Indeed, during the course of the submissions before this Court, no dispute has been raised about the fact that the Letters of Indemnity were executed on the part of the Respondent. The defence, however, is that the Court in England had no jurisdiction and that the judgment of the English Court was not rendered on merits. While considering this defence, it would be necessary to bear in mind the provisions of Section 13 of the Code of Civil Procedure, 1908, under which a foreign judgment shall be

1 (1994) 15 Corporate Law Adviser 92 (at pp.94-95)

conclusive as to any matter thereby directly adjudicated upon between the same parties or between the parties under whom they or any of them claim litigating under the same title. Clauses (a) to (f), however, contain exceptions and two of the exceptions which have been pressed into service on the part of the Respondent are: (i) Where the foreign judgment has not been pronounced by a Court of competent jurisdiction; and (ii) Where the foreign judgment has not been given on the merits of the case. Each of these defences would now be taken up.

7. In so far as the issue of jurisdiction is concerned, clause (7) of the letters of indemnity executed by the Respondent specifically provides that the indemnity shall be governed by and construed in accordance with English Law and that each and every person liable under the Indemnity shall submit to the jurisdiction of the High Court of England. Plainly therefore, clause 7 of the agreement between the parties postulates and recognises the jurisdiction of the High Court of England. But the submission before the Court was that in the action which was brought by the Petitioner against the State Bank of Saurashtra, the English Court had dismissed the action on the ground of a lack of jurisdiction and

the earlier judgment delivered on 15th January 2001 ought to have been brought to the notice of the subsequent Court which dealt with the case instituted by the Petitioner against the Respondent herein. There is absolutely no merit in the submission. The judgment of Mr.Justice Thomas in the Queen's Bench Division in **China Shipping Development Co. Ltd. vs. State Bank of Saurashtra,**[2] would amply demonstrate that the defence of the State Bank of Saurashtra was that the signature of its officer, Shri Vaidya, on the Letters of Indemnity was forged. The Petitioner had obtained permission to serve the proceedings out of jurisdiction on the bank in India. The Bank contended that it was not bound by the Letters of Indemnity as the signature of its officer was forged and, therefore, the English Court had no jurisdiction. The judgment demonstrates that upon considering the evidence on record, the Court in England held that the signature of the Bank's officer was a forgery and that being the position, the service of proceedings on the Bank would have to be set aside. The Bank was held not to be a party to the letter of indemnity and in those circumstances, the action against the Bank came to be dismissed. That however, has no bearing on the nature of the action brought

2 2001 Vol.2 Lloyd's Law Reports 691

by the Petitioner against the Respondent herein. The Letters of Indemnity provide in clause 5 that the liability of each and every person under the indemnity shall be joint and several and shall not be conditional upon the Petitioner proceeding first against any person whether or not such person is a party to or liable under the indemnity. The decision of the English Court in the action brought against the Bank was founded on the finidng that the Bank was not bound by a document on which the signature of its officer was forged. Hence, the decision in the case of the State Bank of Saurashtra cannot establish an absence of jurisdiction in so far as the Respondent is concerned. Save and except the aforesaid, no other ground for assailing the jurisdiction of the English Court has been put forth at the hearing.

8. The contention that the judgment of the Court of England is not a judgment on merits is clearly belied on the face of the record. The Petitioner has produced before the Court a compilation of relevant documents. The judgment of the English Court in the action brought against the Respondent contains an elaborate discussion of the nature of the claim, the evidence and of the merits. Paragraph 3 of the judgment discloses that the Petitioner made a statement before the Court there that it sought

to obtain a Summary Judgment since it was advised that a default judgment was not enforceable against the party in India, where it carries on business. The judgment notes that position inter alia on the ground that the judgment will not be effective unless it is a judgment on merits. Conscious, therefore, of the conditions imposed in Section 13 of the Code of Civil Procedure, 1908, for the enforceability of a foreign judgment, the Petitioner applied for a judgment on merits and it is a judgment on merits that was delivered by the Court in England. It must be noted that at Exh.D to the petition for winding up, the Petitioner has annexed the formal or operative order of the Court of England. Even that order makes it ex-facie clear that the judgment was delivered upon reading the statements of the witnesses and was a judgment granted on merits. That, as noted above, appears amply clear from the text of the reasoned judgment which has also been produced on record.

9. A Defendant to the proceedings before a foreign Court who chooses not to appear despite being served runs the risk of an ex-parte judgment in favour of the Plaintiff and it is a well settled principle of law that even such a judgment would be a judgment given on merits if evidence is adduced on behalf of the Plaintiff and

the judgment is based on a consideration of the evidence. The Supreme Court held in **International Woollen Mills v. Standard Wool (U.K.) Ltd.**:[3]

> "Even where the defendant chooses to remain ex parte and to keep out, it is possible for the Plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant.
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> In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why S.13 does not refer to ex parte judgments falling under a separate category by themselves."

10. Finally, it would be necessary to advert to the pleadings contained in paragraphs 21 and 22 of the Company Petition in which the following averments have been made in regard to the financial status of the Respondent herein:

> "21. That the Petitioner is given to understand that the Company owes substantial amounts to its various suppliers/other creditors which the Company did not pay to them on account of serious irregularities and problems committed created by its Management in the running of

3 AIR 2001 SC 2134

its business. The Petitioner, being the Company's creditor and in that capacity interested and concerned with its state of affairs had a search conducted of its records with the Registrar of Companies (“R. O. C.”) at Mumbai. The search report has revealed that the last annual accounts available on the file of the R. O. C. was for the financial year 2001-02. The Petitioner therefore, infers that the Company has in violation of the statutory provisions of the Companies' Act, 1956 failed to file with the R. O. C. its annual accounts and annual reports for subsequent financial years. The Company despite being required by the Statutory Notice failed to furnish to the Petitioner for its perusal copies of the Company's annual accounts and annual report for the financial years 2002-03, 2003-04 and 2004-05 along with proof of having filed them with the R. O. C. The Company has therefore defaulted in complying with its statutory obligations and is liable for penal action under the provisions of the Companies' Act, 1956. The Petitioner craves leave to refer to and rely upon copies of Company's Annual Report for the year 1998-99 and 2001-02 when produced.

22. That, in any event, even the Company's Annual Accounts for the financial year 2001-2002 disclose a poor and sorry state of financial affairs. The Annual accounts including the Auditor's Report annexed thereto disclose the following:

(a) that the operational loss suffered by the Company for that year was Rs. 8.14 crores while the accumulated losses aggregated to Rs. 225.94 crores,

(b) that Sales and other income came down drastically to Rs. 11.83 crores from Rs. 123.78 crores for the previous year,

(c) that there was non provision of interest liability on loans/dues of foreign creditors due to which the loss for the year was understated,

(d) that the Company's surmounting losses had resulted in its net worth being eroded which had led to a reference being filed by the Company with the BIFR under the provisions of the SICA, 1985 which reference came to be dismissed by the BIFR. Even the Company's Appeal against BIFR's order came to be dismissed by AAIFR,

(e) that the Company did not carry on any business activities at its branches at Bangalore, Chennai, Karwar, Mangalore and Cochin during that year,

(f) that the Company's Bankers' and other parties had filed complaint against the Company and its management with the Economic Offences Wing, Mumbai Police,

(g) that the Company's cash flows were negligible and effectively negative,

(h) that the Company's current assets were negative at Rs. 153.76 crores,

(i) that a single foreign creditor, Shweta International Pte. Ltd., had filed Civil Suit against the Company for recovery of Rs.140 crores or thereabouts,

(j) that the Company's liabilities to creditors/customers alone (excluding Bankers and Ors.) was approximately Rs.166 crores,

(k) that the Company's liability to its Bankers and other secured creditors amounted to Rs. 49.07 crores. That to secure these creditors, the Company had created security by way of hypothecation of stocks and by way of equitable mortgage of land and building, godown and other immovable properties of the Company. It appears that the assets of the Company are mortgaged and/or charged in favour of the Company's Bankers and there are no substantial assets available for recovery of the

debt due to the Petitioner,

(l) that the Company's Bankers, State Bank of Saurahtra and Punjab National Bank had recalled the working capital loan facilities granted to the Company and filed proceedings against the Company before the Debt Recovery Tribunal, Mumbai wherein some interim order/s were passed.

The Company's Balance Sheet shows a heavy list of creditors and loans. The Company's liabilities far exceed its assets. It appears that the Company's operations have been grossly mismanaged, the Company's funds have been misappropriated/siphoned off by its Director/s and/or at their instance and that the Company has played fraud upon and cheated its various creditors. That the Company's objects have failed, it has been trading continuously at a loss and there is no hope of its trading at a profit. Effectively, the Company has lost its substratum. That due to erosion of the Company's net worth and its consequent sickness, its Board of Directors had made a reference to the BIFR under the provisions of SICA, 1985 for determination of measures to be adopted for its revival. It is obvious from the dismissal of the Company's reference by the BIFR that its sickness is beyond cure, that its operations are not likely to become viable in future. The Petitioner submits that the Company is commercially insolvent. The Company is defunct and there is no likelihood of the Company recovering from its financial woes. It is just and equitable in public interest that the Company should be wound up for the benefit of its creditors, workers, shareholders, contributories and all concerned."

In the affidavit in reply, the material averments contained in paragraph 21 and 22 of the petition have been left uncontroverted. In these circumstances, the record before the Court manifestly

reveals that the Company is unable to pay its debts within the meaning of Section 433(e). The requirements of clauses (a) and (c) of Sub-section (1) of Section 434 have independently been duly fulfilled.

11. In these circumstances, the Company Petition shall stand admitted. The Company Petition shall be advertised in two local newspapers, namely, “Free Press Journal”, “Navshakti” and in the Maharashtra Government Gazette. The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary & Senior Master towards the publication charges, within three weeks with intimation to the Company Registrar failing which the Petition shall stand dismissed for non-prosecution.

12. The facts adverted to hereinabove amply establish that this is a fit and proper case where the Official Liquidator should be appointed as a provisional liquidator in terms of prayer clause (a) of Company Application 700 of 2006. From the averment contained in paragraphs 21 and 22 of the Company Petition, it is clear that the financial substratum of the Company has been completely eroded. There shall accordingly be an order in terms of prayer

clause (a) of Company Application 700 of 2006. Until the provisional Liquidator takes charge, the order of injunction dated 7th July 2006 shall continue to operate. Company Application 700 of 2006 shall accordingly stand disposed of.

13. The Official Liquidator to act on an authenticated copy of this order issued by the Facilitation Centre of this Court.

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